No. 82-1024

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE BOEING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Cost Accounting Standard 403, a term of a contract to which petitioner and the Department of Defense agreed, is not binding on petitioner because it was initially developed by the Cost Accounting Standards Board, all the members of which were not appointed by the President.

2. Whether the Court of Claims erred in its interpretation of Cost Accounting Standard 403.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulations:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1024

THE BOEING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-17) is reported at 680 F.2d 132. The decision of the Armed Services Board of Contract Appeals (Pet. App. B-1 to B-65) is unofficially reported at ASBCA No. 19224, 77-1 B.C.A. (CCH) ¶ 12,371. The decision of the Board on reconsideration (Pet. App. C-1 to C-47) is unofficially reported at ASBCA No. 19224, 79-1 B.C.A. (CCH) ¶ 13,708.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1982, and a petition for reconsideration was denied on August 20, 1982 (Pet. App. D). On November 3, 1982, the Chief Justice extended the time to file a petition for a writ of certiorari to and including December 18, 1982 (Pet. App. E), and the petition was filed on December 17, 1982. The jurisdiction of this Court is invoked under former 28 U.S.C. 1255(1).[1]

STATEMENT

1. Petitioner, a party to a cost-plus-fixed-fee contract with the United States Air Force, is a manufacturer of aircraft and other products. Its corporate headquarters is located in Seattle, Washington, where it also has several manufacturing plants. Petitioner is organized in operating divisions; each of its plants is assigned for administrative and maintenance purposes to the division whose activities predominate at the plant. Pet. App. A-3.

---

[1] 28 U.S.C. 1255 was repealed effective October 1, 1982, by Sections 123 and 402 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 36 and 57. Although the judgment of the Court of Claims was rendered prior to that date, the petition was not filed until after Section 1255 had been repealed. In addition, none of the provisions of Section 403 of the Federal Courts Improvement Act, which governs the transfer of pending cases from the Court of Claims, appears to address the availability of certiorari review of cases decided prior to October 1, 1982 but not filed in this Court until after that date. Nevertheless, we assume that for purposes of certiorari review this case may be deemed to have been automatically transferred to the new Federal Circuit on October 1, 1982, and that the jurisdiction of this Court may therefore properly be invoked under 28 U.S.C. 1254(1).

State and local taxes are, in general, paid by petitioner's main office. At the time of the contract in question, petitioner allocated its tax expenses among its divisions in proportion to the number of employees in each division, for purposes of determining the "cost" component of its "cost-plus" defense contracts. This is referred to as the "headcount" allocation system. Pet. App. A-3.

Petitioner entered its contract with the Air Force in September 1972. This contract included the standard Cost Accounting Standards Clause, which required petitioner to "comply with all Cost Accounting Standards in effect on the date of awards of this contract [and] * * * any Cost Accounting Standard which hereafter becomes applicable to a contract or subcontract of the Contractor." Pet. App. A-2 n.1. Thus, any new Cost Accounting Standards promulgated during the life of petitioner's contract with the Air Force became applicable to that contract only if petitioner voluntarily entered into another government contract that incorporated the new standards.

Cost Accounting Standards were promulgated by the Cost Accounting Standards Board (CASB), which was established by the Defense Production Act of 1950, Pub. L. No. 91-379, Section 719(a), 84 Stat. 796, 50 U.S.C. App. 2168. The CASB consisted of the Comptroller General (who is "appointed by the President with the advice and consent of the Senate" (31 U.S.C. (Supp. V) 42(a), as amended by Section 703(a)(1), Pub. L. No. 97-258, 96 Stat. 888)) and four members appointed by the Comptroller General. The Defense Production Act of 1950 provided that the CASB was to "promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense

contractors and subcontractors under Federal contracts." 50 U.S.C. App. 2168(g). The CASB ceased to function on September 30, 1980, after Congress declined to renew its appropriation. 4 C.F.R. 101, Note 1 (1982).

Shortly after petitioner entered its contract with the Air Force, the CASB promulgated Cost Accounting Standard 403. The Defense Department adopted CAS 403 as part of its own regulations (Defense Procurement Circular No. 111 (June 6, 1973)). On August 24, 1973, petitioner advised the government in writing that: "Effective January 1, 1974, the Company will implement Cost Accounting Standard * * * 403" (Rule 4 Submission for ASBCA No. 19224, Exh. IV D). Petitioner has "stipulate[d] that CAS 403 became applicable to [the] contract [involved in this case] on 1 January 1974" (Pet. App. B-3).

2. CAS 403 governs the allocation of petitioner's state and local tax expenses. See 4 C.F.R. 403.20(a); Pet. App. F-10. After CAS 403 became applicable to its contract, petitioner sought payment of its January and February 1974 tax costs, which it had allocated under its headcount method (Pet. App. A-3). The government's contracting officer disallowed $972 of the tax costs claimed by petitioner on the ground that the headcount method does not comply with CAS 403. As the Court of Claims explained (*id.* at A-3 to A-4; footnote omitted):

> According to the contracting officer, CAS 403 mandates the use of an assessment base method of tax cost allocation. Under this method, costs are allocated by using the base which was used to measure the particular tax. For example, because property taxes are assessed on the value of

> property, segment A would be allocated the property taxes attributable to the property it controls.

Petitioner exercised its right under the contract to appeal the contracting officer's disallowance of the $972 in tax costs to the Armed Services Board of Contract Appeals (ASBCA), which upheld the contracting officer's decision (Pet. App. B-1 to B-65). The ASBCA concluded that CAS 403 required petitioner "to the maximum extent practical, * * * [to] identif[y] and allocate[]" its tax expenses "directly to the individual segments" (*id.* at B-62). The ASBCA ruled that the assessment base method satisfied this criterion but that the headcount method did not (see *id.* at A-4).

On cross-motions for summary judgment, the Court of Claims affirmed the decision of the ASBCA in favor of the government in all respects (Pet. App. A-1 to A-17). It specifically agreed with the interpretation of CAS 403 adopted by the contracting officer and the ASBCA (*id.* at A-4 to A-11).

The Court of Claims also considered petitioner's contention that petitioner was not bound by CAS 403 because the members of the Cost Accounting Standards Board were not appointed in the way required by the Appointments Clause, Article II, Section 2, Clause 2 of the Constitution. The Court of Claims accepted petitioner's constitutional contention arguendo, but it ruled that petitioner was not entitled to relief because "the Department of Defense itself adopted CAS 403 and that Department had the independent authority to accept the standard on its own" (Pet. App. A-16). The Court of Claims noted that it could not plausibly be argued that the Department of Defense exceeded its authority in adopting the standard, even if (as petitioner alleged) the Depart-

ment mistakenly assumed that the law required the adoption. "Whatever the departmental motivation, that agency permissibly established the standard and intended to do so. Even if the Cost Accounting Standards Act was invalid, the law would still not limit the sources from which the Defense Department could find and pick its cost standards—so long as those standards were substantively proper (as we have held * * *)" (Pet. App. A-16; footnote omitted). The court added: "There is no doubt, for instance, that Defense could accept the proposals of a committee of private expert accountants which had no official status whatever" (*id.* at A-16 n.17).

Moreover, the Court of Claims ruled that even if it was necessary for "the CASB and its standards [to] have some sort of official standing in themselves," the "principle of the *de facto* officer prevents in this case the past acts of the CASB from being held invalid." Pet. App. A-16, citing *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976). The court explained (Pet. App. A-16 to A-17):

> Equity and practicality demand that result. The number of contracts which would need to be altered, the amount of moneys involved, and the agreement by the contractors to the CAS 403 standards would justify nonretrospective application of any current ruling of unconstitutionality of the method of appointment of the CASB members.

ARGUMENT

1. Petitioner's principal contention (Pet. 8-17) is that cost reimbursement under its contract with the Air Force should not have been judged by CAS 403 because the members of the CASB were not appointed in the way prescribed by the Appointments Clause of the Constitution. The Appointments Clause requires that any person "exercising significant authority pursuant to the laws of the United States" (*Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976)) must be appointed by the President with the Advice and Consent of the Senate, or, in the case of "inferior Officers," by "the President alone, * * * the Courts of Law, or * * * the Heads of Departments." [2]

CAS 403, however, became binding on petitioner not because the CASB exercised some "authority" over petitioner but because petitioner agreed to it. As we have noted, petitioner stipulated that CAS 403 was part of its contract with the government (Pet. App. B-3). Had petitioner agreed to use an accounting standard developed by a private organization, its agreement would surely have been binding, even though that organization could not have exercised any governmental authority over petitioner. Similarly, even if the CASB could not, in the absence of a contract, have ordered petitioner to use certain accounting standards, that does not somehow "taint[]" (FBA Am. Br. 6)[3] a contract term that petitioner voluntarily accepted.

---

[2] Although the Court of Claims assumed arguendo that only one of the members of the now-defunct CASB was appointed in this fashion—and, for the reasons we state below, there is no need for this Court to consider the issue—it is not clear that the Court of Claims' assumption is correct.

[3] "FBA Am. Br." refers to the brief of amicus curiae Federal Bar Association.

Petitioner does not disagree with these principles; it specifically acknowledges that "[c]ontractors who have * * * agreed [to CAS 403 or other CASB standards] would be bound by the accounting standards, whatever their constitutional infirmities, under ordinary contractual principles." Pet. 12. Instead, petitioner's argument hinges entirely on its assertion (Pet. 5 & n.2, 12) that it in fact did not agree to CAS 403 because it insisted on a reservations clause that bound the government to the outcome of this litigation. But petitioner does not, and cannot, suggest that the reservations clause reserved the question whether CAS 403 was a term of the contract to which petitioner was a party; as we have noted, petitioner *stipulated* that CAS 403 was a term of its contract. Petitioner asserts only that the reservations clause reserved the question of "the validity of CAS 403" (Pet. 5 n.2), by which petitioner presumably means the question it now presents—whether CAS 403 was promulgated by a body appointed in a manner consistent with the Appointments Clause (see Pet. i). As we have said, however, the resolution of that question simply has no bearing on whether petitioner was obligated to comply with CAS 403.

In addition, CAS 403 became part of petitioner's government contract on January 1, 1974, and petitioner's claim for the $972 in issue here pertained to its January and February, 1974, taxes (Pet. App. B-1). According to the affidavit of petitioner's Director of Contract Policy, the reservations clause was not even proposed by petitioner until February 1974, and was not accepted by the parties until August 1974. Affidavit of John A. O'Hara at 2-3, appended to Plaintiff's Reply Br. in Support of Summary Judgment, filed in the Court of Claims (May 21, 1981). It is therefore implausible to suppose that

the reservations clause was intended to reserve the question whether CAS 403 was a term of the contract. Instead, as petitioner's affidavit and the reservations clause itself show, the purpose of the reservations clause—which, according to petitioner's officer, "is a common practice in contracting with the Department of Defense" (*id.* at 2)—was only to "provide for accounting practices to be followed * * * pending receipt of a final decision resolving the dispute * * * with respect to accounting practices applicable * * * *under* Cost Accounting Standard 403" (*id.* at 2-3; emphasis added).

2. As the Court of Claims noted, even if CAS 403 were somehow rendered an invalid contract term because it was promulgated by the CASB, the Department of Defense independently adopted CAS 403. Petitioner does not deny that the Department has the constitutional and statutory authority to do so (see 10 U.S.C. 2202); instead, it argues that the Department acted only because it considered itself obligated to follow the CASB's standards. In fact, the desirability of maintaining "uniformity and consistency in * * * cost-accounting principles" (50 U.S.C. App. 2168(g)), and the undoubted expertise of the CASB, were more than sufficient reason for the Department of Defense to adopt the CASB standard at issue in this case without legal compulsion.[4]

---

[4] For this reason petitioner is incorrect in its contention (Pet. 16 & n.12) that if the Department of Defense attempted to dissuade the CASB from adopting CAS 403, the Department's subsequent adoption of CAS 403 must have been prompted by its belief that it was obligated to follow the CASB. Moreover, the Department's comments on CAS 403 to which petitioner refers (Pet. 16 n.12) were in no sense a generalized objection to the standard; they were merely suggestions concerning certain aspects of the standard, most of which are irrelevant to this case.

Moreover, as petitioner itself notes (Pet. 9 n.4), in 1970, only three years before the Department adopted CAS 403, President Nixon, in his statement accompanying the signing of the bill that created the CASB, indicated that he doubted the power of the CASB to impose accounting standards on the executive branch. Statement by the President on Signing Bill to Extend the Defense Production Act of 1950, Aug. 17, 1970, 6 Weekly Comp. Pres. Doc. 1079 (Aug. 24, 1970). President Nixon was still in office when the Department of Defense adopted CAS 403. It is unlikely that the Department nonetheless believed that it was obligated to adopt CAS 403.

Petitioner's argument to the contrary (Pet. 16 & n.11; see AIA Am. Br. 5)[5] relies entirely on Defense Procurement Circular No. 99 (May 4, 1972) (Pet. App. F-68 to F-69).[6] But Circular No. 99 did not adopt CAS 403; CAS 403 was adopted by Defense Procurement Circular No. 111 (June 6, 1973), which did not suggest that the Department considered itself bound by the CASB's decisions.[7] Furthermore, both Circular No. 99 and Circular No. 111 expressly cited, and relied on, 10 U.S.C. 2202, which gives the Secre-

---

[5] "AIA Am. Br." refers to the brief of amicus curiae Aerospace Industries Association.

[6] Petitioner also emphasizes (Pet. 16) that the statute establishing the CASB prescribed that the standards it promulgated "shall be used" by federal contracting agencies. 50 U.S.C. App. 2168(g). But the agencies could comply with this provision by "using" the standards as advisory or optional uniform guidelines. Petitioner does not show why, in view of the executive branch's express constitutional doubts about the mandatory imposition of CASB standards, this is not the interpertation they adopted.

[7] Circular No. 111 is reproduced as an appendix to this brief.

tary of Defense independent authority to adopt regulations governing contracts, "[n]otwithstanding any other provision of law * * *." See generally *Paul* v. *United States*, 371 U.S. 245, 252-254 (1963); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947); *Boeing Co.* v. *United States*, 480 F.2d 854, 867-868 & n.18 (Ct. Cl. 1973); *Whiteside* v. *United States*, 93 U.S. 247, 250 (1876).

For similar reasons, petitioner is unable to specify any principled basis for determining the appropriate remedy for the constitutional violation it alleges. Petitioner suggests (Pet. 13 n.7) that the Court of Claims should have held CAS 403 to be an invalid contract term and then applied the accounting standards that the Department of Defense used before it adopted CAS 403. But there is no reason to assume that the Department would simply have ignored an accounting standard proposed by an expert government body; the more plausible assumption is that it would have adopted that standard, in the interest of uniformity, whether or not it believed it was required to do so.[8] Should it be determined, contrary to the Court of Claims' finding, that the Department of Defense did consider itself obligated to adopt CAS 403, petitioner suggests no way to decide the hypothetical question of what the Department and other federal contracting agencies would have done if they had not viewed themselves as bound to follow the CASB.[9]

---

[8] President Nixon's statement, for example, specifically did not object to "the establishment of cost-accounting standards." 6 Weekly Comp. Pres. Doc. 1079 (Aug. 24, 1970). See also S. Rep. No. 91-890, 91st Cong., 2d Sess. 15-16 (1970) (letter of the Director of the Bureau of the Budget endorsing establishment of uniform standards).

[9] Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127-128 (1940) (footnotes omitted):

3. Petitioner also challenges (Pet. 17-22) the interpretation of CAS 403 that was adopted by the Court of Claims and the ASBCA. Petitioner wholly fails to explain why the interpretation of a single term of a government contract, in a case involving $972, is a matter of sufficient importance to warrant this Court's review, especially after the ASBCA and the Court of Claims agreed on an interpretation.

Moreover, petitioner does not take issue with the Court of Claims' conclusion that "[b]y the literal terms of the new accounting standard, * * * the assessment base system [used by the government] is permissible and the headcount approach [used by petitioner] seems improper" (Pet. App. A-6). Instead, petitioner relies entirely on statements issued by the CASB after CAS 403 was promulgated and adopted by the Department of Defense. Petitioner does not explain why these CASB statements, which were not part of the contract, should be given great weight in interpreting the terms of the contract, especially when petitioner denies that the CASB had the authority to order accounting standards into effect. Petitioner nowhere explains how CAS 403 itself can be read to

---

[T]he Government enjoys the unrestricted power * * * to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. * * * [T]he traditional principle [calls for] * * * leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers[, not] * * * a bestowal of litigable rights upon those desirous of selling to the Government * * *. Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice * * *.

yield the interpretation it advocates. In any event, petitioner's arguments based on the subsequent CASB statements are faulty in a variety of ways. For example, petitioner relies heavily (see Pet. 20-21) on the CASB's Interpretation No. 1 of CAS 403; but that Interpretation dealt with income and franchise taxes (see Pet. App. F-36), which are not involved in this case at all.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
AL J. DANIEL, JR.
Attorneys

MARCH 1983

APPENDIX

DEFENSE PROCUREMENT CIRCULAR

6 JUNE 1973 NUMBER 111

This Defense Procurement Circular is issued by direction of the Assistant Secretary of Defense (Installations and Logistics) pursuant to the authority contained in 5 U.S. Code 301, 10 U.S.C. Code 2202, DOD Directive No. 4105.30, and ASPR 1-106.

All Armed Services Procurement Regulation material and other directive material published herein is effective upon receipt except as otherwise indicated.

Unless otherwise indicated in the introductory language preceding an item, each item in this Circular shall remain in effect until the effective date of that subsequent ASPR revision which incorporates the item, or until specifically canceled.

Reproduction authorized.

CONTENTS

ITEM I—
CASB STANDARDS AND REGULATIONS

The following changes to ASPR Section III, Part 12, and Appendix O are published to reflect recent revisions to the CASB Regulations and Standards. 3-1203 and 3-1204 are revised to incorporate the latest exemption and waiver regulations regarding the con-

tract clause and disclosure statement. These changes to 3-1203 and 3-1204 supersede those published in Item V of DPC 108. 3-1211 is new material and is added to reflect the requirements of 331.3(c) of Appendix O. A revised Appendix O, incorporating the latest published CASB changes, is included in this DPC. This Appendix O supersedes the one published in DPC 99 and the changes to Appendix O published in DPC 108.

Add new paragraph:

3-1211 *Waiver of Cost Accounting Standards, Rules and Regulations.* In some instances contractors or subcontractors may refuse to accept all or part of the provisions of the Cost Accounting Standards clause (see 7-104.83). If the PCO determines that it is impractical to obtain the materials, supplies or services from any other source, he shall prepare the documentation required by Paragraph 331.3(c) of Appendix O and forward the information through channels to the Office of the Assistant Secretary of Defense (I&L) CD, Washington, D.C., 20301. Data required by 331.3(c)(1)(iii) and 331.3(c)(2)(i) of Appendix O is available from the DD 350 Data Bank and may be obtained by contacting the Procurement and Economic Information Division, OASD (C), Washington, D.C., 20301 or calling 202-697-5619.

APPENDIX O

CODE OF FEDERAL REGULATIONS
TITLE 4—ACCOUNTS
CHAPTER III—
COST ACCOUNTING STANDARDS BOARD
COST ACCOUNTING STANDARDS, RULES, AND REGULATIONS

Subchapter C—Procurement Practices

[Defense Procurement Circular No. 111 here sets out the provisions of 4 C.F.R. Parts 331, 351, and 400-404 then in effect.]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 401217 1308